STATE OF WISCONSIN CIRCUIT COURT BRANCH 12 DANE COUNTY

MILWAUKEE BRANCH OF THE NAACP, et al.,
Plaintiffs,
v.

Case No. 11CV5492
Case Code 30701

SCOTT WALKER, et al.,
Defendants.

PLAINTIFFS' RESPONSE OPPOSING DEFENDANTS' MOTION TO STAY PERMANENT INJUNCTION

Defendants seek a stay pending appeal of this Court's Order Granting Motion for Permanent Injunction (Order), entered on July 17, 2012. Defendants grossly overstate the balance of equities as in their favor, as well as their likelihood of ultimate success on the merits. As a result, their motion should be denied for its failure to satisfy the standard of Wis. Stat. §806.08: (1) a strong showing that the movant is likely to succeed on the merits of the appeal; (2) a showing that, unless a stay is granted, the movant will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest. *In re Marriage of Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787, 788 (Ct. App. 1986); *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶5, 237 Wis. 2d 498, 502, 614 N.W.2d 565, 568.

Pursuant to Wis. Stat. §806.08 and the four-part standard articulated in *Leggett*, this Court may generally balance the equities against the merits when a movant seeks relief pending appeal. *Scullion*, 2000 WI App at ¶5. Nevertheless, the movant "is always required to demonstrate more than the mere 'possibility' of success on the merits." *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225, 229 (1995). In this case, where Plaintiffs have a

probable likelihood of success on the merits and Act 23 imposes significant burdens on the precious right to vote for hundreds of thousands of otherwise constitutionally qualified electors, the federal rule articulated by the Fifth Circuit Court of Appeals in *Ruiz*, which Defendants cite as support, imposes a cautionary and more stringent standard, and one which Defendants' submission fails to meet:

> The stay procedure . . . affords interim relief where relative harm and the uncertainty of final disposition justify it. Of course, if the balance of equities (i.e. consideration of the other three factors) is not heavily tilted in the movant's favor, the movant must then make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal.

Ruiz v. Estelle, 650 F.2d 555, 565-566 (5th Cir. 1981).

Defendants Have Demonstrated Neither a Strong Nor Substantial Case on the Merits

Defendants contend that the bare presumption of constitutionality of a legislative enactment by itself ought to satisfy the "merits" prong of the four-part test articulated in *Leggett.* While the Court relied upon such a presumption in *Gudenschwager,* it did so with the caveat that "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [petitioner] will suffer absent the stay." Accordingly, the Court proceeded to find "substantially probable" that the defendant, a "sexually violent person" committed under Ch. 980, would engage in "additional acts of sexual violence" unless his release from prison was stayed by the Court. 191 Wis. 2d at 441-443. As shown below, the Defendants make no claim of probable imminent harm, which might justify a stay of the court's July 17 Order enjoining the Photo ID requirement of Act 23. Rather than favoring Defendants -- as it must where the movants' showing on the merits is less than 50% -- the balance of equities in this case strongly favors the Plaintiffs. The imposition of a new, stringent voting requirement less than two months prior to a high turnout general election will burden over 300,000 constitutionally qualified

electors who are otherwise eligible to vote on November 6. Defendants made absolutely no showing at trial or in the instant Motion that the Photo ID requirement is essential to prevent some pending, potential, or imminent harm in the upcoming election.

Alternatively, Defendants erroneously assert six substantive issues around which the Court allegedly erred to bolster its claim to a likelihood of success on the merits. These are addressed *in seriatim*.

First, Defendants contend that the Court's finding cannot support a facial challenge where the majority of voters can comply with the law. In fact, the Court found that a substantial number of otherwise qualified voters – over 300,000 -- lack an Act 23-acceptable Photo ID who would be significantly burdened by the challenged law's requirement. In the context of First Amendment cases, the U.S. Supreme Court has held that a facial challenge can be entertained and a statute invalidated if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n. 6 (2008) (quoting *New York v. Ferber,* 458 U.S. 747-769-771 (1982)). Although Defendants invoke *Crawford v. Marion County* as support for the notion that a facial challenge to a Photo ID law is inappropriate, relevant factors present in *Crawford* are significantly absent here. The Supreme Court declined to entertain a facial challenge in *Crawford* because it concluded that there was only "a small number of voters who may experience a special burden under the statute" and the Court could not even quantify both the number of electors without acceptable photo identification and difficulties faced by indigent voters. *Crawford,* 553 U.S. at 200-201 (emphasis added). By any reasonable standard, 300,000-plus voters lacking photo ID constitute a substantial section of the electorate warranting

facial invalidation. As this Court's Order stated in the opening paragraph: "That is a lot of people, and most of them are already registered voters." Order at 1.

Second, Defendants maintain that their appeal has a strong probability of success because this Court employed heightened scrutiny of the challenged statute rather than a "deferential and flexible standard." In fact, the Order accurately summarized the relevant Wisconsin precedent construing the right to vote, concluding that the Wisconsin Supreme Court has always opted to "consider the actual impact of the statute rather than simply deferring to the stated purpose of the law." Order at 17. The Order recognized that protecting the integrity of the electoral process is a legitimate objective, but since Act 23 affects the essential and fundamental right to vote, the Court was obligated to address also "whether the law is narrowly tailored to serve that interest effectively without imposing a significant burden upon the opportunity to constitutionally qualified voters to gain access to the ballot." Order at 17.

The Circuit Court correctly applied the level of scrutiny employed by the Wisconsin Supreme Court in election related cases over the past 150 years. This Court acknowledged that the legislature may enact laws which regulate the voting process to the extent that they do not unreasonably burden or intrude upon voter access. The Circuit Court relied upon the Wisconsin Supreme Court's oft-expressed principle that the legislature may regulate aspects of the voting process, including ballot access, but ultimately may not effectively frustrate the exercise of the franchise by qualified electors:

> These decisions establish the rule that legislation on the subject of elections is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

State ex rel. van Alstine v. Frear, 142 Wis. 320, 341, 125 N.W. 561 (1910), *quoted in State ex rel. Barber v. Circuit Court*, 178 Wis. 468, 190 N.W. 563 (1922). The *Van Alstine* formulation provides the correct standard under Wisconsin law to evaluate the validity of any statute which imposes certain restrictions on the exercise of the right to vote. Plaintiffs concur that this formulation is also consistent with federal jurisprudence in this area, represented by the *Anderson/Burdick* sliding scale test which requires that "severe" restrictions on voting rights must be narrowly drawn to advance a compelling state interest and that less severe, or reasonable restrictions are generally justified by state's regulatory interests. *Anderson v. Celebrezze,* 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992).

Third, Defendants argue that the Court erred by "holding that the right to vote should be treated differently under the Wisconsin Constitution than it is treated under the federal constitution." In fact, the Court did not hold that the right to vote under the Wisconsin Constitution is or must be construed differently than the same right under the federal constitution. Rather, the Court simply explained why it reached a different conclusion than the U.S. Supreme Court did in its analysis of the Indiana law at issue in *Crawford,* which was predicated upon a very different factual record, and a different law which provided greater protections for voters. While the Court noted that the Wisconsin Constitution may provide different or greater protections of the right to vote, it never so concluded, simply noting Wisconsin's explicit guarantee under article III, section 1. Moreover, the holding in *Crawford* never even suggested that photo ID is *per se* constitutional. Whether photo ID laws of states other than Indiana would pass muster under the federal constitution is not determined, as the Court limited its holding as follows: "on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements'

on any class of voters." *Crawford,* 553 U.S. at 202 (citations omitted). By concluding that the outcome in *Crawford* does not control the outcome in the instant case, the Circuit Court here distinguished the Wisconsin law from the Indiana law and the factual records in each case regarding the actual impairment upon voting rights imposed by the two laws

As the Court's Order noted, it is the province of the people of Wisconsin and our courts to determine the meaning of our state constitutional provisions. In a variety of constitutional contexts, the Wisconsin Supreme Court has construed our state constitutional provisions independently of the manner in which counterpart provisions of the federal constitution have been construed and interpreted. This principle holds especially where there are textual dissimilarities in the two constitutions and where rights are explicit only in the state constitution, as in the case here regarding the right to vote. *See State v. Miller,* 202 Wis.2d 56, 65-66, 549 N.W.2d 235 (1996) ("freedom of conscience as guaranteed by the Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision"); *see also State v. Hansford,* 219 Wis. 2d 226, 242, 580 N.W.2d 171 (1998) (Wisconsin not U.S. Constitution requires 12-member jury); *State v. Doe,* 78 Wis.2d 161, 171-72, 254 N.W.2d 210 (1977) (broader rights to counsel for criminal defendants). With respect to voting rights, the Wisconsin Supreme Court has never held – or even intimated – that the fundamental right to vote explicitly set forth in article III, section 1 is subject to the identical interpretation as its federal counterpart. Defendants cite a single case – *Wagner v. Milwaukee County Election Comm'n.,* 2003 WI 103, ¶ 76, 263 Wis.2d 709, 666 N.W.2d 816 – for the proposition that the right to vote in Wisconsin must be construed identically as the federal constitution. However, *Wagner* was a ballot access case which did not "compel close scrutiny"

and the Court in that case never discussed the substantive similarities between the right to vote under the Wisconsin and the federal constitutions.

Plaintiffs' claims are founded exclusively on the intersection of the Wisconsin Constitution's fundamental, explicit right to vote in article III, sec. 1 and the burdens on that right created by Act 23, which the Court found to be "the single most restrictive voter eligibility law in the United States." Order at 2. There can be no doctrinal inconsistency in the Court's Order and *Crawford* where Act 23 "offers no flexibility, no alternative to prevent the exclusion of a constitutionally qualified voter" (Order at 18) and thereby differs significantly from the Indiana law, which allows voters to affirm their eligibility by affidavit, permitting accommodation unavailable under Act 23.

Whether article III, section 1 of the Wisconsin Constitution provides greater protection from regulation than its federal counterpart is an interesting question, but the Court's Order in this case did not base its decision on any such distinction. Rather, the Court relied on the testimony of 33 witnesses, who are constitutionally qualified voters having experienced a carousel of difficulties in procuring Act 23 acceptable photo IDs from the DMV, and the testimony of Professor Mayer, who credibly established that at least 300,000 constitutionally qualified voters currently lack a photo ID and may confront similar obstacles in order to exercise their right to vote. The scope and severity of these burdens for a substantial number of constitutionally qualified electors was the lynchpin of the Circuit Court's Order to permanently enjoin the Photo ID requirement of Act 23 as a substantial impairment of the right to vote guaranteed by article III, section 1 of the Wisconsin Constitution.

Fourth, Defendants argue that the Court erred in accepting the well-founded statistical conclusions of Plaintiffs' expert witness, Prof. Kenneth Mayer, that 333,276 constitutionally

qualified electors lack an Act 23-acceptable photo ID. In fact, Prof. Mayer provided a highly plausible report and cogent testimony of his investigation. He conducted an exact match of two large state governmental databases: registered voters in the Statewide Voter Registration System (SVRS) and those individuals with either a driver license or photo ID in the Wisconsin Department of Transportation files. The Court reasonably concluded that this exact matching technique is a "reliable and well-recognized method to compare large governmental databases" and was an appropriate investigative technique in this case. Order at 9.

Through the exact match, Prof. Mayer produced an estimated 301,727 registrants in the SVRS file who lacked either a Wisconsin driver license or WisDOT photo ID (non-matching registrants). This number represented 9.3% of the total registrants. While Defendants correctly claim that name discrepancies in the databases cause some non-matches, multiple factors confirm the overall reliability of the estimated number of identified non-matches in this type of exact matching technique. For example, the HAVA checks performed by the Wisconsin GAB from 2008 to 2009, and the Georgia study cited by Prof. Hood identified very similar trends in the license and ID non-possession rates among voter registrant pools. In addition, two demographic groups – the elderly and Milwaukee County residents – lacked licenses and IDs at higher rates and further validated the results, as they were consistent with previous studies showing that the elderly and minorities have higher non-possession rates.

After identifying these non-matches, Prof. Mayer relied upon census data to compute that 946,712 Wisconsinites not in the SVRS files are eligible to register to vote, and then conservatively estimated that the same 9.3% of that population – or 87,747 – also lack a WisDOT driver license or photo ID. Prof. Mayer then subtracted an estimated 56,178 persons who possess alternative forms of Act 23-acceptable photo ID (e.g., tribal IDs, student IDs,

military IDs), to reach his ultimate factual finding that an estimated 333,276 eligible electors lack an Act 23 acceptable Photo ID. The Court's factual findings, ¶¶ 16-24, adopted the reasonable, reliable and accurate estimates from Prof. Mayer's statistical conclusions in quantifying the significant portion of the electorate whose right to vote has been substantively burdened by the photo ID requirements of Act 23.

Neither of Defendants' two experts posited a plausible or credible alternative to Prof. Mayer's conclusions. Dr. Morrison's findings were not relevant or reliable, as he disregarded the SVRS file and relied exclusively upon the WisDOT records which were proven to over-report the number of state residents who possess driver licenses. Prof. Hood utilized essentially the same exact matching method as Prof. Mayer to compute the number of registered voters lacking a WisDOT driver license or photo ID, but subsequently claimed that such a method was unreliable because it elicited some false non-matches. Prof. Mayer never represented his findings as precise findings, but as reliable estimates of the number of registrants lacking WisDOT IDs. In agnostic fashion, Prof. Hood failed to adduce any estimate of the number of non-matched registered voters, or explain why he relied on the exact match method in his academic articles which analyzed the impact of the photo ID law in Georgia. In sum, the Circuit Court correctly relied upon Prof. Mayer's statistical conclusions, as they represented the only reliable estimate of the number of eligible electors lacking Act 23 acceptable photo ID.

Fifth, Defendants also assert a likelihood of ultimate success on the merits because an appellate tribunal will discount the testimony of the 33 voters who incurred significant monetary and time-consuming burdens in attempting to procure a WisDOT photo ID in order to vote. Defendants characterize this testimony as "anecdotal" and suggest that it is not probative of the types of burdens that hundreds of thousands of eligible voters may incur if the photo ID

requirement of Act 23 is implemented. Defendants offer no reason to explain why the pecuniary cost ($20 in Wisconsin and often higher for electors born out-of-state) attendant to procuring a required birth certificate is not a substantial burden, especially for indigent and low income voters such as many of the plaintiffs and witnesses. Defendants' arguments that some of these witnesses could have mitigated the time and costs involved in obtaining a photo ID by better planning (e.g., calling ahead to avoid long lines at the DMV, getting family to drive instead of paying for public transportation, researching the documentation necessary to obtain photo ID before going to the DMV) seek to impose unreasonable standards of conduct for routine matters upon ordinary voters simply attempting to exercise their right to vote.

Sixth, Defendants also argue they have a likelihood of ultimate success because the Circuit Court failed to recognize that the photo ID requirement of Act 23 is "reasonably calculated to advance the State's compelling interests in preventing electoral fraud and promoting voter confidence in the integrity of election." Defendants misstate the Court's conclusions in this regard but most importantly fail to recognize their own failing of proof with respect to this issue. The Court's Order acknowledged that protection of the integrity of the election process is a legitimate government interest. Order at 17. However, the Court correctly concluded that Act 23 was not "narrowly tailored to serve that interest effectively without imposing a substantial burden upon the opportunity of constitutionally qualified electors to gain access to the ballot." Order at 17. Moreover, the Court made reasonable factual findings based upon Prof. Mayer's reports and testimony regarding vote fraud in Wisconsin, proving that over recent election cycles officials have not prosecuted or uncovered vote fraud violations that could have been detected or prevented by the photo ID requirement of Act 23. Order at 12. Defendants presented no affirmative evidence to support their proposition that the photo ID requirement of

Act 23 would have any discernible impact on vote fraud in Wisconsin, or on voter confidence in the electoral process. Defendants' failure to rebut Prof. Mayer's findings and to present any evidence of their own renders their ultimate success on this issue remote.

The Balance of Harms Strongly Support Maintenance of the Injunction and Denial of Defendants' Motion

Defendants thoroughly fail to satisfy the second G*udenschwager* factor requiring proof that in the absence of a stay they demonstrate they will suffer irreparable injury. In fact, Defendants posit no fact suggesting that a stay of the photo ID requirement of Act 23 will cause the GAB or any other state actor to suffer any particularized or likely injury, much less irreparable harm. This of course is consistent with Defendants' utter failure to demonstrate throughout every phase of the proceedings thus far that the photo ID requirement of Act 23 was essential or otherwise necessary to combat any form of vote fraud, cure or prevent irregularities in the electoral process, or even restore confidence in the integrity of the ballot. Thus, Defendants' only claim to harm in the absence of a stay is their bare suggestion that they will suffer sufficient "irreparable injury" warranting a stay of the injunction purely by virtue of the fact that the state has been enjoined from implementing a statute enacted by the legislature.

Defendants contend that this circular reasoning is supported by Justice Rehnquist's stay in *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977). In *New Motor Vehicle Bd.,* Justice Rehnquist clearly did not rely solely on the mere fact that the state was enjoined from implementing a law, but delineated some highly particularized forms of irreparable injury that the state would likely incur absent a stay. In other contexts, the U.S. Supreme Court has held that merely enjoining the government from implementing a legislative enactment is insufficient to show harm. For example, in denying a stay regarding enforcement of

a state law regarding computerization of drug prescriptions, Justice Marshall held: "While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury." *Whalen v.Roe,* 423 U.S. 1313, 1317 (1975). Likewise, mere delay here in implementation of the photo ID requirement – which had never been employed heretofore in the history of our state's 164 years and was only in place for one (midterm and primary) election in February 2012 -- is not irreparable harm.

Regarding the third and fourth *Gudenschwager* prongs, the balance of harms with respect to other interested parties and the public interest renders a stay of the Court's Order inequitable and inappropriate. Defendants fail to address or even acknowledge the overriding fact that over 300,000 voters – who are disproportionately minority and elderly voters – would be potentially disenfranchised if the photo ID requirement were implemented in the upcoming November 6 election. The potential disenfranchisement of such a large group of voters for a critical Presidential election weighs heavily against the issuance of a stay. Thus, even if Defendants made a more colorable showing on the likelihood of ultimate success – which they have not, as shown above – issuance of a stay based on the balance of harms in this case would be improper.

In odd fashion, Defendants claim that voters currently without photo ID will be harmed by a temporary injunction because they will be lulled into thinking that they do not need a photo ID for the November 6 election, and will not receive the benefit of the GAB's educational outreach campaign which has been suspended during the pendency of the Court's temporary and permanent injunctions. In fact, requiring over 300,000 voters to encounter the various pecuniary and time-consuming obstacles in obtaining a WisDOT photo ID less than two months prior to the general election will result in significant numbers of voters being unable to vote and will create

unworkable and chaotic administrative burdens for the GAB to restart an educational campaign and implementation of the law on an absurdly abbreviated timetable.

Conclusion

In summary, Defendants have failed to demonstrate two crucial elements to prevail in their request for a stay of the Court's Order. First, they have not shown a reasonable likelihood of prevailing on appeal on the merits of the case. Second, the balance of harms in this case overwhelmingly militates against the issuance of a stay of the Court's permanent injunction. A stay would create an unprecedented magnitude of hardship for over 300,000 voters facing disenfranchisement in the upcoming November 6 election. Such overarching harm is the only meaningful harm at issue in this matter to either the public interest or to any other parties who might be affected by this litigation.

Accordingly, Plaintiffs respectfully request that Defendants' Motion to Stay Permanent Injunction be denied.

September 4, 2012

Respectfully submitted,

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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2012AP1652

Dane County Circuit Court Case No. 11CV5492

MILWAUKEE BRANCH OF THE NAACP, et al.,
Plaintiffs-Respondents,

v.

SCOTT WALKER, et al.,
Defendants-Appellants-Petitioners.

STATEMENT OF PLAINTIFFS-RESPONDENTS REGARDING DEFENDANTS-APPELLANTS-PETITIONERS' MOTION TO STAY PERMANENT INJUNCTION

Given that the Petition to Bypass is presently before this Court and this appeal remains in the Court of Appeals, District II, Plaintiffs-Respondents, by the undersigned, hereby advise this Court that they defer a response to the Motion to Stay until after this Court's direction to the parties that it has decided the Petition and asserted its jurisdiction over this case. The procedural rules for the Supreme Court, Wis. Stat. §§809.60-809.64, indicate that the applicable procedural rules are triggered by the Court's exercise of jurisdiction over a proceeding: "When the supreme court takes jurisdiction of an appeal or other proceeding, the rules governing procedures in the court of appeals are applicable to proceedings in the Supreme Court unless otherwise ordered by the Supreme Court in a particular case." Wis. Stat. §809.63.

Should this Court grant the Petition, Plaintiffs-Respondents are prepared to file a response opposing the motion, consistent with any Order indicating the date by which the response to the Motion to Stay Permanent Injunction must be filed.

Respectfully submitted,
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STATE OF WISCONSIN
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RESPONSE OF PLAINTIFFS-RESPONDENTS IN OPPOSITION TO DEFENDANTS-APPELLANTS-PETITIONERS' PETITION TO BYPASS COURT OF APPEALS AND MOTION FOR CONSOLIDATION

September 4, 2012

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INTRODUCTION

Plaintiffs-Respondents hereby oppose the Petition to Bypass the Court of Appeals, District II, and the Motion for Consolidation of this appeal with the appeal of *League of Women Voters of Wis. Educ. Network, Inc. v. Walker,* no. 2012AP584 (District IV) and Petitioners' efforts to expedite this appeal hurriedly to allow for implementation of the photo ID requirement of Act 23 at the General Election on November 6th.

ARGUMENT

I. The Petition to Bypass Should Be Denied Because Review by the Court of Appeals is Appropriate to Address the Asserted Substantial Evidentiary Errors by the Circuit Court, to Provide Useful Analysis to This Court and Because Expediting This Appeal Is Contrary to the Public Interest

There being no statutory standard by which to determine the merits of a petition to bypass the Court of Appeals, Petitioners address the various criteria enumerated in Wis. Stat. §809.62(1r) which the Court may consider in granting review. Without question, this matter does present a "novel" question, "the resolution of which will have statewide impact." Wis. Stat. §809.62(1r)(c)2. However, the more immediate consideration is whether intermediate appellate review of this matter is appropriate and would be beneficial. Whether this case eventually will be resolved by this Court because of the very "novel" question of the constitutionality of photo ID certainly does not preclude the benefits of and the propriety of intermediate appellate review, as discussed below.

A. The Court of Appeals Provides a Valuable Error Correcting Role Where, as Here, Petitioners Raise Substantial Fact Questions

This appeal is well within the inherent, error correcting function of the Court of Appeals and should be briefed in and heard by the Court of Appeals. Bypass would not benefit this Court and it should deny the Petition to Bypass for the following reasons.

This Court should deny the Petition because this appeal rests largely on Petitioners' claims of reversible error by the Circuit Court in several substantial evidentiary areas, all regarding expert and lay evidence. Petitioners assert that the Circuit Court erred in its acceptance of and consideration of the expert testimony and expert reports presented at trial and by "accepting the statistical conclusions of Plaintiffs' expert witness." (Petitioners' Motion to Stay Permanent Injunction at 10.) Petitioners also assert that the Circuit Court erred in its consideration of and factual findings regarding "the anecdotal testimony of the individual fact witnesses. " (*Id.*) Petitioners assert that in both of these evidentiary areas, the Circuit Court erred in factually finding that the photo ID requirement of Act 23 rendered the exercise of the franchise more difficult for otherwise qualified voters. (*Id.*) Further, Petitioners challenge the Circuit Court's consideration of and conclusions regarding the legislature's reasons supporting the enactment of Act 23. (*Id.* at 10-11.)

Assessing the Circuit Court's decision-making regarding such evidentiary matters is fundamentally a matter for an error-correcting court and properly within the province of the Court of Appeals. The judiciary has long recognized that the "primary function" of the Court of Appeals "is error correcting." *Cook v. Cook,* 208 Wis. 2d 166, 188, 560 N.W.2d 246, 255 (1997). This Court acknowledged in *Cook,* also, that the Court of Appeals may also perform a second function of "law defining and law development," stating: "[U]nder some circumstances it necessarily performs a second function, that of law defining and law development, as it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides." *Id.*

In urging that this Court take jurisdiction of this appeal by bypass of the Court of Appeals, Petitioners ignore the inherent function of the Court of Appeals in error correcting and addressing fact questions. Petitioners also ignore the potential value to this Court of the review by intermediate appellate judges of these very issues. Even in cases where this Court exercises *de novo* review over purely questions of law, this Court has noted that it "benefit[s] from the analyses of the circuit court and the court of appeals." *Blum v. 1st Auto & Casualty Ins. Co.,* 2010 WI 78, ¶14, 326 Wis. 2d 729, 738, 786 N.W.2d 78, 83; *Hull v. State Farm Mut. Auto. Ins. Co.,* 222 Wis. 2d 627, 636, 586 N.W.2d 863, 866 (1998).

B. The Section 809.62(1r)(c) Criteria: Appellate Review in This Case Does Not Require New Doctrinal Development, but Involves the Application of Well-Settled Principles to Particular Facts

In further support of their petition, Petitioners also assert that this appeal would more appropriately be before this Court now because it meets the standards for discretionary review by this Court, as articulated in Wis. Stat. §809.62(1r)(c), regarding the need for consistent and harmonized jurisprudence. Petitioners posit that the Circuit Court's injunction is inconsistent with over a century of law regarding election regulation and requires this Court's immediate attention to harmonize the jurisprudence in the protection of electoral integrity. On page 11 of the Petition, Petitioners suggest that the photo ID requirement of Act 23 falls into the category of a "reasonable regulation designed to protect the integrity of elections" which the Supreme Court has always recognized as a proper subject of legislative enactments. However, a regulation that is unreasonable or otherwise imposes burdensome requirements tantamount to a denial of the right to vote is an unconstitutional and invalid enactment. The Circuit Court adhered faithfully to this long-standing jurisprudence, and made sound factual findings that procuring an Act 23-acceptable photo ID is a time-consuming, costly (including for many voters the $20 fee for a Wisconsin birth certificate), constitutionally burdensome requirement that may adversely affect over 300,000 constitutionally qualified electors. Petitioners may disagree with the Circuit Court's factual findings in this

regard and whether the Court correctly characterized the severity and the scope of the burdens created by the photo ID requirement, but they cannot correctly claim that the Circuit Court's theoretical framework was premised upon anything but the relevant precedent of the Wisconsin Supreme Court.

Accordingly, the case law outlined by Petitioners is consistent with the Circuit Court's decision. For example, Petitioners rely on *State ex rel. Cothren v. Lean*, a post-election challenge to the results of a referendum on moving the Iowa County seat. 9 Wis. 279 (1859). *Cothren* involved a procedural deficiency (failure properly to publish the ballot question) and a voting statute which expanded the general, affirming oath that challenged voters took to answer specific questions about the challenged elector's qualifications. 9 Wis. at 283. The vote was rejected only if a challenged voter refused voluntarily to answer verbally the prescribed questions. In approving such an oral examination of challenged electors, the *Cothren* Court merely considered an affirming oath to a challenged voter to be reasonable. 9 Wis. at 283-284.

Petitioners cite voter registry cases, including *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875), for the proposition that the Legislature may protect electoral integrity by procedures that do not severely burden or substantially impair voting rights. The Court in *Wood v. Baker* upheld the residency oath required of an elector whose name was inadvertently omitted from the registered list of voters. While noting the validity of the registry law, the Court held that where the

registry list was improperly created by election officials, the omission of the names of otherwise constitutionally qualified voters from the list could not be used to disenfranchise any elector by not counting his or her vote. *Id.* at 87-88.

Similarly, in *State ex rel. Small v Bosacki,* this Court affirmed an election for Minocqua town clerk on determining that fifteen transient loggers, who had no intent to reside permanently in the jurisdiction, were not permanent residents capable of voting in that jurisdiction. 154 Wis. 475, 143 N.W. 175 (1913).

This Court has distinguished the routine requirements attendant to registration and residency laws from conditions which are unduly burdensome, impractical or otherwise difficult or impossible for certain voters to meet. For example, in a case just five years after *Wood,* the court struck down a registration requirement which absolutely prohibited an otherwise qualified elector from voting unless the voter met the age, residency, or citizenship qualifications in the interim period between the close of registration and the election. *Dells v. Kennedy,* 49 Wis. 555 (1880). The *Dells* court clearly defined the relationship between what it characterized as the "sacred right" to vote and the legislature's prescription of regulations to ensure the "orderly exercise of the right":

> The elector possessing the qualifications prescribed by the constitution is invested with the constitutional right to vote at any election in this state . . . . "[I]t is admitted that the legislature must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure its full and free exercise. But this duty and right inherently imply that such regulations are to be subordinate

> to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded, under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory."

Id. at 556-557 (quoting *Page v. Allen,* 58 Pa. 338 (Pa. 1868)). The Court in *Dells* was primarily concerned with the fact that certain voters would be disenfranchised due to unique and particular problems that the absolute prohibition imposed:

> By the effect of this law, the elector *may*, and in many cases, *must* and *will*, lose his vote, by being utterly unable to comply with this law by reason of absence, physical disability, or non-age, and an elector can lose his vote without his own default or negligence in these particulars.
>
> This language of the learned counsel is most strikingly suggestive of the very vice of this law which is fatal to its validity. That vice is, that the law disenfranchises a constitutionally qualified elector, without his default or negligence, and makes no exception in his favor, and provides no method, chance or opportunity for him to make proof of his qualifications on the day of election, the only time, perchance, when he could possibly do so. This law undertakes to do what no law can do, and that is to deprive a person of an absolute right without his laches, default, negligence or consent; and in order to exercise and enjoy it, to require him to accomplish an impossibility.
>
> [A] registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or

> method or regulations prescribed by law for such purpose and to such end, deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disenfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those names in the constitution.

Id. at 557-558.

As in *Wood v. Baker* and *Dells v. Kennedy,* the Supreme Court has consistently applied a standard of reasonableness to scrutinize election regulations to ensure they do not unduly burden or otherwise disenfranchise qualified voters on election day. The Circuit Court here applied this long-standing principle after finding that Act 23 deprived otherwise qualified electors, who for various reasonable and foreseeable reasons might lack an Act 23 acceptable photo ID on election day, an opportunity to prove their identify by alternative means.

Petitioners cite various election administration and procedural challenges to election results, as well as ballot access cases, seeking to analogize the legislature's authority to regulate elections with laws which restrict the individual elector's right to vote. Apart from the voter registry and residency requirements, such cases do not address statutes, such as Act 23, which burden or divest a citizen of the right to vote. Rather, they concern ballot form, ballot access, election dates, and other procedural and administrative formalities. *See Gradinjan*

v. Boho, 29 Wis. 2d. 674, 139 N.W.2d 557 (1966) (absentee ballots must be authenticated by imprint or initials of municipal clerks); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949) (legislative authority to move date of elections for supreme court justice and state superintendent of education governed by reasonableness standard, similar to legislative exercise over primary elections); *State ex rel. Barber v. Circuit Court,* 178 Wis. 468, 190 N.W. 563 (1922) (tracing origins of ballot laws and candidate requirements in dispute over result of judicial election); *State ex rel. van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961 (1910) (validity of a state primary law); *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W.1041 (1910) (regulation of results of primary elections and the prescribed methods of vote tabulation); *State ex rel. Runge v. Anderson*, 100 Wis. 523, 533-534 (1898) (ban on "double printing of names of candidates" on the official ballot).

Such ballot access and voting procedures intrude upon the fundamental and preservative voting rights of individual electors only if they frustrate the will of the voter or otherwise restrict the ability to express support for the voters' preferred candidates. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (primary concern is not the rights of candidates to be on the ballot, but the will of electors to associate and express their support for candidates). This Court has often expressed this principle: that the legislature may regulate aspects of the

voting process but ultimately cannot effectively frustrate the exercise of the franchise by qualified electors:

> These decisions establish the rule that legislation on the subject of elections is within the constitutional power of the legislature so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

State ex rel. van Alstine v. Frear, Id. at 341, 125 N.W. at 969, *quoted by State ex rel. Barber v. Circuit Court*, 178 Wis. 468, 190 N.W. 563 (1922).

Petitioners seek complex and extraordinary procedural relief to resolve what they claim is a doctrinal conflict between the Circuit Court's holding and a century and a half of Supreme Court jurisprudence. However, the issues raised by Petitioners' challenge do not posit a different theoretical framework than that employed by the Circuit Court. That Petitioners raise various fact various questions in this appeal further militates against Supreme Court review, pursuant to the criteria enumerated in Wis. Stat. §809.62(1r)(c)3, in that the reasons for granting review include consideration that "[t]he question presented is not factual in nature. . . ." There being no need to harmonize the Court's voting rights jurisprudence or immediately to resolve Petitioners' fact-based challenges to the Circuit Court's Order, exigent short-circuiting of the regular appellate procedure in this matter is unnecessary and inconsistent with the statutory bases for doing so.

C. Because of the Significant Constitutional Right at Stake and the Harm of Disenfranchisement to a Substantial Number of Constitutionally Qualified Electors It is Contrary to the Public Interest to Rush to Decide This Appeal

Petitioners focus their argument supporting bypass and an expeditious decision from this Court (prior to Plaintiffs-Respondents having filed their brief-in-chief in the Court of Appeals, and contrary to Wis. Stat. §809.60(1)) simply on their assertion of an urgency in implementing the photo ID requirement of Act 10 at the general election on November 6th. With November 6th as their deadline, Petitioners urge that this Court should hastily bypass the Court of Appeals, consolidate the instant case with *League of Women Voters,* 2012AP584 (District IV), and impose the photo ID requirement on the over 300,000 constitutionally qualified and registered voters in Wisconsin whom the Circuit Court found to lack an Act 23 photo ID and on the election officials statewide who must scramble to effectuate the law in less than two months. Asserting publicly that he will give "no quarter" in seeking to reinstate the photo ID requirement of Act 23 at the November 6th election, the Wisconsin Attorney General in the Petition and Motion disregards the effect of his requests on the voting rights of hundreds of thousands of constitutionally qualified voters and the orderly administration of the voting process. *See:* http://www.jsonline.com/news/statepolitics/van-hollen-again-asks-supreme-court-to-take-up-photo-id-law-bn6init-166895996.html.

Imposing the photo ID requirement in such a precipitous fashion will produce confusion and chaos at the polls statewide. In order to promote a voter education program and to train election officials, the Government Accountability Board (GAB) itself postponed implementation of the photo ID requirement of Act 23 from its effective date on June 10, 2011 until the midterm local and primary elections on February 21, 2012. The Circuit Court's injunction preserves the pre-Act 23 *status quo* for all constitutionally qualified Wisconsin electors, as it has existed for 164 years in every one of this State's elections prior to February 21, 2012, and as was also in place for the April and June 2012 elections.

Petitioners urge haste here because, they argue, the State of Wisconsin suffers irreparable injury by the very act of the Circuit Court having enjoined implementation of a statute. In support of this notion, Petitioners rely on a stay issued by Justice Rehnquist and reported in *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345 (1977). In *New Motor Vehicle Bd.* Justice Rehnquist did stay an injunction but he did not rely solely on the mere fact that the state was enjoined from implementing a law. Instead, he delineated some highly particularized forms of irreparable injury that the state would likely incur absent a stay. *Id.* at 1351. In other contexts, the U.S. Supreme Court has held that merely enjoining the government from implementing a legislative enactment is insufficient to show irreparable harm. For example, in denying a stay prohibiting enforcement of a state law regarding computerization of drug prescriptions Justice

Marshall held, "While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury." *Whalen v. Rose,* 423 U.S. 1313, 1317 (1975). Similarly, mere delay here in implementing the photo ID requirement does not constitute irreparable harm requiring this Court to rush to bypass, consolidate and decide this appeal by November 6th.

II. This Appeal Should Proceed in District II and Need Not Be Consolidated with the *League* Appeal in District IV Because the Two Separate Appeals Pose No Danger of Producing Inconsistent or Doctrinally Incompatible Decisions.

The two appeals need not be consolidated prior to completion of their review by District II and District IV of the Court of Appeals. This case and the *League of Women Voters* case followed two separate courses (*League* concluding on summary judgment and this case concluding in a trial) in separate branches of the Dane County Circuit Court, with the parties never seeking consolidation. Each appeal merits careful appellate attention and development and would benefit from briefing, argument and review by both of the Courts of Appeals and by the Supreme Court.

Each appeal presents a distinct constitutional claim of significance and complexity. Because the two cases implicate separate and different constitutional provisions there is no danger that the two Courts of Appeal would produce doctrinally incompatible or irreconcilable decisions. This appeal concerns Act

23's infringement on citizens' explicit right to vote as conferred by article III, section 1. On July 17, 2012, following a trial and thorough briefing, the Dane County Circuit Court, Branch 12, concluded that, despite the presumption of constitutionality, the photo ID requirements of Act 23 "constitute a substantial impairment of the right to vote guaranteed by Article III, Section 1 of the Wisconsin Constitution" and "are inconsistent with, and in violation of Article III, Section 1 of the Wisconsin Constitution." (P-Ap. 120.)

In contrast, the appeal in *League of Women Voters* instead concerns whether the photo ID requirement falls within the enumerated powers conferred to the Legislature by article III, section 2. On March 12, 2012, following summary judgment briefing and argument, the Dane County Circuit Court, Branch 9 declared that the photo ID requirement of Act 23 is outside the express legislative authority to regulate elections of article III, section 2 and thereby presents an unconstitutional "condition for voting at the polls," violating article III, sections 1 and 2. (P-Ap. 124-125, 128.)

Because of the profound significance of the constitutional rights implicated in this appeal and all of the arguments above, this appeal would not benefit from expedited review. It is appropriate that this case follow the normal procedural channels and this Court receive the benefit of thorough intermediate appellate review. Having the benefit of the decision of the Court of Appeals in District II, this Court obviously reserves the authority at a later date to determine

whether it is appropriate to consolidate this matter and the *League* appeal for its final appellate review of the constitutional challenges to Act 23.

CONCLUSION

In consideration of all of the foregoing reasons, Plaintiffs-Respondents respectfully request that this Court deny the Petition to Bypass the Court of Appeals and deny the Motion for Consolidation.

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Respectfully submitted,
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